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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

MEL THOMPSON, Plaintiff and Respondent, v. COPPER COVE UNIT 8-A OWNERS' ASSOCIATION, Defendant and Appellant.	C044254 (Super. Ct. No. CV28236)

Mel Thompson, a resident of the Copper Cove at Lake Tulloch subdivision and a member of its owners' association (CCOA), filed this action for declaratory and injunctive relief against CCOA and the owners' association for Unit 8-A of the subdivision (8-AOA). He prevailed on a motion for summary adjudication of his prayer for declaratory relief. He then dismissed his prayer for injunctive relief against the 8-AOA, and entered into a stipulated judgment with the CCOA on his prayer for an injunction. The trial court entered judgment. Only the 8-AOA

appealed. The court subsequently awarded the plaintiff his costs and legal fees.

The 8-AOA contends the plaintiff did not have standing to maintain this action, the trial court erred in allowing the plaintiff to renew a previous motion for summary adjudication, the trial court erred on the merits in interpreting the various recorded declarations of restrictions on the Copper Cove common-interest development, the plaintiff could not dismiss it from the action without adjudicating its affirmative defense of laches, and the award of legal fees was inappropriate. We shall affirm.

In resolving this dispute we will interpret the declarations filed as each unit of the subdivision developed. It suffices to say at this point that all residents of Copper Cove are members of the CCOA; however, only the declaration for Unit 8-A provides for a separate owners' association. In 1999, the 8-AOA filed an amendment to its own declaration, to the end of terminating its members' obligations for CCOA dues and assessments, which asserted that the unit was no longer subject to the general restrictions incorporated by reference in its declaration (as well as those of other units). The CCOA at first acceded to this action. The plaintiff, a resident of Unit 7, filed this action to determine whether Unit 8-A had the power to unilaterally withdraw from the CCOA, and to compel the CCOA to enforce dues and assessments against Unit 8-A. The trial court ruled in his favor on both issues. We will set out the necessary facts in the Discussion and affirm the judgment.

DISCUSSION

I

"The covenants and restrictions in the declaration shall be enforceable equitable servitudes . . . . Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the [owners'] association, or both." (Civ. Code, § 1354, subd. (a).)

The 8-AOA makes the metaphysically facile argument that the plaintiff has no standing to bring this action because he is not a resident of Unit 8-A and therefore cannot seek to interpret the effect on the Unit 8-A declaration of its 1999 amendment. This disregards the gist of this action. The plaintiff was entitled under the common law to bring an action to compel the CCOA to enforce the general restrictions applicable to every unit in the subdivision, in addition to bringing an action against the particular residents violating them. (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1247; see *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268.) The 8-AOA posits an interpretation of the various unit declarations as limiting the enforcement of the general restrictions contained in each to residents of that unit. This is unreasonable, as it would lead to the absurd result of leaving units powerless to respond to violations of the general restrictions by another unit, contrary to all principles of common-interest developments. We thus find that the plaintiff had standing.

II

The plaintiff initially moved for summary adjudication of his prayer for declaratory relief in September 2002.[1] He asked the court in connection with the motion to take judicial notice of the various Copper Cove unit declarations appended to his request for judicial notice. The 8-AOA objected to plaintiff's request for judicial notice of the declarations, citing a lack of authentication among other bases. The court denied the request for judicial notice because copies attached to the request were not certified, and thus denied the motion.

The plaintiff filed a motion attesting to counsel's clerical error in failing to include all the certifications and asking the court whether he could renew the motion with the proper documents (asking in the alternative for relief pursuant to Code of Civil Procedure section 473 for excusable neglect of counsel). The 8-AOA argued that Code of Civil Procedure section 1008 precluded the plaintiff from bringing another motion, but acknowledged that the court might have the inherent power to allow a second motion sua sponte. The court granted the motion "pursuant to Code of Civil Procedure §§ 473 and 1008, as well as on the court's inherent powers to reconsider sua sponte."

We need not resolve whether clerical oversight resulting in the exclusion of evidence on a technical basis is a satisfactory

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[1] We need not consider whether this was a proper invocation of summary adjudication. (Code Civ. Proc., § 437c, subd. (f).)

explanation allowing the reconsideration of the evidence as "new or different facts" under Code of Civil Procedure section 1008 (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690), or warrants discretionary relief under Code of Civil Procedure section 473, subdivision (b). We ally ourselves with the courts which have held that nothing in Code of Civil Procedure section 1008 can prevent a court from exercising its inherent power to reconsider an interim ruling sua sponte (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 205-211), whether the exercise of this power comes as "'an unprovoked flash of understanding in the middle of the night or is prompted . . . by the stimulus of a motion.'" (*Id.* at p. 210.) The salutary gatekeeping function of the statute, designed to deter litigants from wasting the court's time with repeated applications, is not defeated when a court rethinks its denial of an interim ruling to bring litigation to an expeditious close. (*Id.* at p. 211.) The present case does not present the invidious spectacle of forum shopping (compare *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 391 (*Kearns*)); rather, it allowed the plaintiff to overcome the most technical of bases for denying a motion for summary adjudication. We reject the invocation of cases to the contrary (see *Scott*, *supra*, 107 Cal.App.4th at pp. 206-207) as unpersuasive.[2]

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[2] *Kearns* believed it would countenance evasion of the statute's restrictions on reconsideration if a party could invite the

III

We now come to the heart of the appeal. The trial court ruled that the Unit 8-A declaration did not empower the 8-AOA to excise the general restrictions incorporated by reference in all unit declarations in the subdivision. As there was no extrinsic interpretive evidence, we decide the question de novo. (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1244.)

A

Original declaration for Units 1 and 2 (recorded June 1969):

The preamble recites that the declaration was to further "a plan for the subdivision," and that these units were "one [*sic*] of several units in the subdivided land area generally known as Copper Cove at Lake Tulloch . . . , which have been or will be developed from adjoining lands owned by Declarant and annexed to the subdivision as detailed herein." It provided that every person who acquired title to a lot in the unit shall become a member of the CCOA, which was granted the power to levy annual charges against every lot in the unit.

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exercise of the inherent power to reconsider. (106 Cal.App.4th at p. 389.) This presupposes a rubber-stamp trial court unable to distinguish between a proper candidate for exercise of its inherent power and the "brazen forum shopping section 1008 is specifically intended to bar." (*Id.* at p. 391.) The latter would constitute an abuse of the discretion conferred on a trial court in ruling on reconsideration (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457) and thus be correctible on appeal.

Under the portion of the declaration describing the process of future annexations to the subdivision, "Such annexation shall be effective upon the recordation of declarations, designating the property subject thereto, which property shall thereupon become . . . a part of the Subdivision and the Association shall accept and exercise such powers and jurisdiction over such property as are granted to it by such declarations. Such declarations shall be substantially the same as those contained herein; provided, however, that [¶] . . . [¶] "(c) The Association's powers to make assessments and enforce liens shall not be curtailed with respect to such newly annexed units" and "(e) Such restrictions may impose additional limitations upon the property subject thereto . . . , but shall not have the effect of alleviating any of the provisions herein or of any restrictions pertaining to other units already annexed to the Subdivision."

Declarations for Units 3 and 4 and Unit 7 (recorded September and December 1969):

The declarations use identical pertinent language. In the recitals, the developer noted his intent to subject the lots in these units to the same restrictions recorded in connection with Lots 1 and 2, "which restrictions . . . are to apply to all subsequent units of subdivided land area generally known as Copper Cove at Lake Tulloch . . . ." Thus, "All of said lots are held . . . subject to the said Restrictions, which . . . are hereby incorporated by reference . . . as though set forth herein at length, all of which are declared . . . to be in

furtherance of a plan for . . . said lots and . . . for the purpose of enhancing . . . the value . . . of the property described in the Map and of the Subdivision as a whole."

Declaration for Unit 8-A (recorded December 1971):

The developer again noted his intent to subject the lots in Unit 8-A to the so-called "General Restrictions" recorded in connection with Units 1 and 2, and further recited an intent to annex other property in the future "to said Subdivision in the manner provided in Paragraph 4 of said General Restrictions and upon such annexation shall become a part of the Subdivision and shall become subject to said General Restrictions . . . ." The developer declared "that all of the . . . lots of said Unit No. 8-A . . . are held . . . subject to said General Restrictions . . . as if set forth herein at length, and to any additional restrictions . . . hereinafter set forth . . . , all of which are declared . . . to be in furtherance of a plan for . . . said lots and are established . . . for the purpose of enhancing . . . the value . . . of the property described in the Map and of the Subdivision as a whole . . . . **In the event of any conflict . . . in the provisions of the General Restrictions and the Additional Restrictions as applied to lots in Unit 8-A subject thereto, the provisions of the Additional Restrictions . . . shall in all cases apply and govern, any provision in the General Restrictions to the contrary notwithstanding.**" (Emphasis added.)

The declaration included "additional restrictions." Among these, section 3 established the 8-AOA; section 4 empowered the

8-AOA, inter alia, to assess charges and enforce restrictions applicable to lots in Unit 8-A; and section 9 named 17 "Specific Limitations, Covenants, Agreements, Restrictions, Conditions, Easements and Charges," concluding with a provision that "(q) **The covenants herein contained** . . . shall bind all . . . owners of lots . . . until January 1, 2000 A.D., at which time said covenants shall be automatically extended for successive periods of ten . . . years each, unless by action of the owners of a majority of lots in Unit 8-A, **said covenants shall be amended** . . . ." (Emphasis added.)

B

We interpret declarations such as these according to the standard rules for construing written instruments. (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1410.) Paramount is the intent of the executor. (*Ibid.*)

The paramount intention of the original developer could not appear more plainly: the application of the restrictions first appearing in the Unit 1 and 2 declaration to every lot eventually annexed to the Copper Cove subdivision, pursuant to the overall plan for development. This original declaration also envisaged an annexation process in which future declarations could not curtail the CCOA's power to make assessments and to enforce liens with respect to newly annexed units, or contain provisions in derogation of "the provisions herein or of any restrictions pertaining to other units already annexed to the Subdivision." It is in light of this manifest

intent that we interpret the provisions of the Unit 8-A declaration.

Through incorporation by reference, these restrictions are a part of the Unit 8-A declaration. The 8-AOA attempts to limit the provision we have just quoted to interfere with the declarations of other units, but that is not a reasonable reading of the language. We must interpret the declaration's "additional restrictions" in such a way that they do not curtail the CCOA's power to make assessments and enforce liens, or derogate the provisions of the general restrictions.

We agree with the trial court that the best way to fulfill the intent of the developer is to limit the reach of the power to amend under section 9(q) to the property restrictions contained within that same section. This makes grammatical sense, as it appears within a subdivision of that section rather than under the general powers of the 8-AOA in section 4. Moreover, it harmonizes the declared preeminence of the general restrictions with the additional restrictions, giving effect to all parts.[3] Finally, it would be at odds with the developer's overall plan for the subdivision to allow an individual unit the power to unilaterally void the application of the subdivision's general restrictions to its lots.

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[3] As we can harmonize the provisions in this fashion, we need not resort to the conflict provision of the Unit 8-A general declaration.

IV

In response to the plaintiff's renewed motion for summary adjudication, the 8-AOA filed its own motion for summary judgment also based on the Copper Cove declarations. The trial court issued its ruling on the parties' motions on January 28, 2003. On February 20, the day before the scheduled trial, the clerk entered the plaintiff's request to dismiss the 8-AOA as to the second "cause of action" for injunctive relief. The parties appeared in court the next day, at which time the trial court signed a formal order reflecting its ruling on the two motions for declaratory relief, and accepted a stipulated judgment (Code Civ. Proc., § 664.6) between the plaintiff and the CCOA regarding the injunctive relief. On March 6, the court filed a judgment that incorporated its earlier order on declaratory relief and the stipulated injunctive relief. The plaintiff served notice of the entry of judgment on March 11.

On March 24, the 8-AOA filed its notice of intent to move for a new trial on its affirmative defenses to injunctive relief, which it contended were improperly foreclosed by its dismissal from the action and thus amounted either to irregularity in the proceedings or to accident or surprise. (Code Civ. Proc., § 657, subds. (1), (3).) The 8-AOA complained that it would be bearing the burden of any injunctive relief to which the CCOA and the plaintiff stipulated. On June 9, the court filed an order noting that the motion was denied by operation of law (*id.*, § 660), but also stating its view that

the dismissal of a party was not the type of action warranting relief in a motion for new trial.

On appeal, the 8-AOA contends that the statute governing voluntary dismissals (Code Civ. Proc., § 581, subd. (c)) applies to causes of action, not remedies, and therefore it was deprived of raising the defense of laches to any injunctive relief (as 30 months had elapsed between the recordation of its amended declaration and the commencement of this action).[4]

The use of the term "cause of action" in a statute can be ambiguous, because it has both the formal meaning of a plaintiff with a primary right, and a defendant's breach of a corresponding primary duty, as well as the common usage describing a theory of recovery. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159-1160 (*McDowell*) [reference in statute to a "cause of action" for injunctive relief must have been intended in common sense rather than formal sense]); see *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 735, fn. 2.)

The statute itself does not have the internal ambiguity at issue in *McDowell*. It currently provides that "A plaintiff may dismiss [a] complaint, or any cause of action asserted in it, in its entirety, or as to any defendant . . . , prior to the actual commencement of trial." (Code Civ. Proc., § 581, subd. (c).)

In an earlier version, the statute similarly allowed a party to dismiss "any cause of action at any time before

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[4] The merits of the defense are not before us.

decision rendered by the court." (Stats. 1963, ch. 874, § 5, p. 2123.) In *Steele v. Litton Industries, Inc.* (1968) 260 Cal.App.2d 157 (*Steele*), the plaintiff dismissed claims for equitable relief. (*Id.* at pp. 160-161.) The defendants contended this barred his entire action from retrial. In order to provide guidance to the trial court on the retrial of the matter, the Court of Appeal noted the two meanings of "cause of action," and concluded, "the Legislature in using the words 'action' and 'cause of action' in section 581 of the Code of Civil Procedure intended such words to include a count or counts in a single pleading wherein alternative remedies are sought"; therefore, the plaintiff properly dismissed his equitable remedies without barring his entire action on retrial. (*Id.* at pp. 171-172.)[5]

Thus, the voluntary dismissal statute already has a judicial gloss under which the common usage for "cause of action" is the correct interpretation. There is no reason to limit *Steele* to its context of election of remedies. If "cause of action" is synonymous with counts for purposes of remedies, it is equally synonymous with counts for any other purpose, including one or more of defendants, under its present wording.

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[5] Although the 8-AOA notes that this is dicta, it is *Steele*'s dicta on an issue "presented to the trial court" and "extensively argued" in the appellate briefs, and would arise inevitably on retrial. (260 Cal.App.2d at p. 171.) It is therefore not the type of ill-considered dicta unworthy of precedential effect. (*Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971.)

As a result, there was not a procedural irregularity warranting the grant of a new trial.

As for "accident or surprise," the 8-AOA could have raised laches in connection with the request for declaratory relief to nip any request for injunctive relief at its substantive bud. (*Empire W. S. I. Dist. v. Stratford I. Dist.* (1937) 10 Cal.2d 376, 378, 382.) The omission of laches is thus not a function of the voluntary dismissal but the 8-AOA's litigation strategy.

Finally, the voluntary dismissal of the 8-AOA does not amount to any subterfuge binding it to an injunction to which it was not a party. The injunction compels the CCOA to levy and collect its assessments from Unit 8-A members--it does not (and cannot) compel Unit 8-A members to comply with CCOA's demands. That Unit 8-A members do not have a legal leg on which to resist the assessments flows from the interpretation of the Copper Cove declarations at issue in the motions to which the 8-AOA *was* a party.

V

The 8-AOA filed its notice of appeal on June 10, 2003. It identified "the March 6, 2003, judgment . . . and, to the extent subject to appellate review, the May 22, 2003, order . . . denying [the] motion for a limited new trial." A week later, the trial court issued an order granting the motion of the plaintiff for recovery of his costs and legal fees. Shortly thereafter, the 8-AOA notified the trial court's clerk that it intended to proceed by way of an appendix, and requested the

preparation of various reporter's transcripts (including the hearing on the motion to recover legal fees).

The 8-AOA's opening brief states that this appeal was from a final judgment on March 6, and does not identify any other notice of appeal. Nonetheless, it attacks the award of legal fees to the plaintiff.

The plaintiff's opposition brief points out the absence of any notice of appeal from the postjudgment order awarding costs and legal fees, and argues that we thus have no jurisdiction to address the order. For the first time in its reply brief, the 8-AOA attempts to invoke cases that excuse the absence of a notice of appeal where the designation of transcripts could be construed as a functional equivalent. Even if this authority is not too late (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8), it is inapposite.

Except where a judgment awards costs or legal fees and simply reserves the amount for later determination, an appeal from the judgment does not embrace the separately appealable order after judgment. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43-44; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47; cf. *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147-148 [expert witness fees].) The judgment in the present case did not make any determination of costs or legal fees: "Issues regarding recovery of attorney's fees and costs shall be determined by post judgment motions." Unit 8-A was required to file a notice of appeal from the postjudgment order.

Department of Industrial Relations v. Nielsen Construction Co. (1996) 51 Cal.App.4th 1016 involved an overlooked notice of appeal, served on the defendants but never filed with the trial court. The plaintiff requested the clerk of the trial court to prepare clerk's and reporter's transcripts. (*Id.* at p. 1023.) Among the designated documents were the judgment and the notice of appeal that the plaintiff apparently assumed were in the file. (*Id.* at p. 1024.) "We construe DLSE's request for transcripts, with its references to a previously filed notice of appeal and a specific judgment being appealed, as manifesting DLSE's intent to appeal." (*Id.* at p. 1024.) The case relied on our earlier decision in *Wilbur v. Cull* (1954) 127 Cal.App.2d 655, wherein we noted that "a long line of decisions . . . repeatedly h[o]ld that a notice and demand for transcript[s], addressed to the clerk of the court, which contains language substantially stating that notice is given that the party . . . 'desires and intends to appeal' . . . is a sufficient notice of appeal to transfer jurisdiction to the appellate court even though no separate or other notice of appeal is filed." (*Id.* at p. 657.) Thus, a demand of the clerk for the reporter's transcript, which included a statement that "the plaintiffs . . . *are about to file a Notice of Appeal* from an order made . . . on the *30th day of March*" (*id.* at p. 656, first italics added), came within this principle and could be construed as a notice of appeal from a specific order. (*Id.* at p. 658.)

Other than a bare reference to itself as "appellant," there is nothing in the 8-AOA's election and designation manifesting

an intent to *appeal* from the outcome of the designated hearing on legal fees. Moreover, unlike either case cited *infra*, the designation does not identify the postjudgment *order* from which the 8-AOA now asks us to treat the designation as a notice of appeal. We cannot stretch the Rules of Court this far to excuse an utter failure to file a notice of appeal.

As a result, we are without jurisdiction to consider the postjudgment order. We therefore do not consider the arguments of the defendant on the issue of legal fees.

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

BLEASE, J.